Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS, ALBERT DEUSER, and PHYLLIS MENKE,

Petitioners,

v.

ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER, WILLIAM E. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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125 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether official immunity protects the conduct of officers who in 1986 took into custody a penniless inebriated youth, removed him from a fair on federal ground, sanctioned by the federal government, thereby separating him from his friends and driver and then stranding him in an unfamiliar area far from home without assistance, causing his death near the abandonment point.

2. Whether the Eighth Circuit can disregard the factual record and reasonable inferences drawn therefrom supportive of petitioners' case and grant judgment as a matter of law based upon facts supportive of respondents' case.

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Tina Marie Sellers, by and through her guardian, natural mother, and next friend Joann Sellers, Albert Deuser and Phyllis Menke, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 2) is reported at Sellers, by and through Sellers v. Baer, 28 F.3d 895 (8th Cir. 1994). The relevant memoranda, orders and judgments of the District Court (App. 25-85) are not reported.

JURISDICTION

The judgment of the Court of Appeals (App. 2) was entered on July 8, 1994. A petition for rehearing, along with a suggestion for rehearing in en banc, was denied on August 16, 1994. The jurisdiction of this Court is invoked under 28

U.S.C. 1254(1). (App. 1) This petition is timely filed pursuant to Missouri v. Jenkins, 110 S.Ct. 1651, 495 U.S. 33 (1990), 109 L.Ed.2d 31.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> **Capital crimes, double jeopardy, self-incrimination; due process, just compensation for property**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [Emphasis added.]

2. The Fourth Amendment to the United States Constitution provides:

> **Searches and Seizures**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Emphasis added.]

3. The Fourteenth Amendment to the United States Constitution provides:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Title 42, Section 1983 of the United States Code provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

1. Each year, at the Jefferson National Expansion Memorial in St. Louis, Missouri (Gateway Arch and grounds), a Fourth of July fair is held on federally owned ground pursuant to approval and license from the United States Department of Interior.

On July 4, 1986, Larry Deuser attended the fair. Evidence indicates that he had consumed approximately fifteen (15) beers in seven hours and had a blood alcohol level of 0.230 to 0.232, more than twice the level for legal intoxication. After attempting to grab at female attendees of the fair and urinating on the fairgrounds, he was arrested by defendant National Park Rangers Vecera and Bridges at approximately 8:50 p.m. Once in custody, Deuser was taken to the Park Rangers' tent on the fairgrounds for detention and processing where he was observed by supervisory Ranger Burnett at 8:55 p.m. The subject was searched and no money was found on him. There was identification indicating an address in Normandy, Missouri, in North St. Louis County.

They left the tent about twenty minutes after arrival, or 9:15 p.m. Robert Terney, Deuser's friend who followed the incident, testified that he saw Deuser between 9:30 and 9:35 p.m. as he was taken to the police cruiser. Deuser told Terney to come and get him.

Defendant King, a St. Louis police officer, arrived at the scene and was asked by Vecera and Bridges to arrest Deuser for "causing trouble." King responded that another officer would have to make the arrest because his duties that night were for prisoner conveyance. After conferring with Supervisor Burnett, Vecera and Bridges requested that King take Deuser far enough from the fairgrounds so he could not return in the time remaining pursuant to the instructions of Supervisor Burnett. King agreed, and asked Vecera and Bridges to accompany him.

The St. Louis Police Department had mandatory regulations that police officers were to follow in the event of encountering an intoxicated person. The regulations required that Deuser be protected by taking him to a hospital,

a detoxification center, a holding cell, or leaving him with a friend or family. (App. 86).

According to the time table established by the officers' testimony, Deuser was placed in the police cruiser after discussion among the officers. The officers allege that Deuser was released about ten blocks away from the fair in a parking lot behind the federal building in downtown St. Louis, next to a police station. Petitioner's contrary evidence refutes the location.

According to King, they drove Deuser on Memorial Drive to Market, west on Market to Broadway, south on Broadway to Spruce and west on Spruce to the corner of Spruce and Tucker streets, approximately ten blocks from the fairgrounds. Bridges' testimony regarding the alleged driven route materially differs. He said they drove Deuser on Memorial Street and turned west on Market to Tucker, south on Tucker to Spruce and west on Spruce to 13th Street. It took fifteen minutes to arrive at the destination point in the crowded traffic, thereby making the time of arrival 9:30 p.m. Finally, it took five minutes to uncuff, warn and release Larry

Deuser, which would make the time of his release 9:35 p.m. All time estimates provided by respondents' sworn testimony.

When King released Deuser, he asked him if he understood the rangers' instructions not to return to the fairgrounds and if he did, he would be arrested. Deuser allegedly responded that he understood. King never asked Deuser where he lived, how he arrived at the fair, if he had any money, whether he was with anyone, if he needed to make a phone call or if he needed help or assistance.

Deuser was struck and killed by an automobile on Interstate 44 in or near the westbound outside lane just east of Jefferson, nearly one and one-half miles southwest of his alleged release point and the fair. According to Polk, the driver of the automobile which struck Deuser, the time of the accident was between 9:40 p.m. and 9:45 p.m. Another witness to the accident, Roland Foulks, gave a statement to an Assistant U.S. Attorney that the accident occurred when the fireworks at the fair had just begun. The fireworks began at 10:00 p.m. and ended at 10:22 p.m. Based on the evidence, it

appears Deuser was killed shortly after his release from custody at or near the point of abandonment on Interstate 44 at Jefferson. The Jefferson exit was, at that time, the closest interstate exit south of the fairgrounds, where a driver could exit, re-enter going the opposite direction and return to the fair. The police cruiser was facing south pointing towards the interstate entrance as it left the fairgrounds.

The medical examiner's report found Deuser's blood alcohol level to be .214. Dr. Martinez, a toxicology expert, has testified by affidavit that based upon the consumption rate and the coroner's report, Deuser's blood alcohol level at the time of his release was between .230 and .232. Further, Dr. Martinez opined that Deuser was obviously intoxicated to the extent that he could not care for himself without supervision.

Had the accident happened between 9:40 p.m. and 10:00 p.m. as Foulks and Polk say, it would have been exceedingly difficult for a sober person to negotiate the one and one-half mile journey from the corner of Spruce and Tucker to Interstate 44 and Jefferson in minutes, let alone a person in Deuser's condition. In addition, this implies that

Deuser traveled southwest, a direction away from his home in north St. Louis County. His ride home was Terney, whose vehicle was downtown near the fair and east of petitioners' alleged point of release, Jefferson and 44, and east was the direction Deuser was walking when killed.

Vecera's initial report dated July 6, 1986, before he knew of Deuser's death, stated he observed "an intoxicated subject, Larry Deuser." However, in the supplemental reports filed after the Rangers learned Deuser was killed and after a report indicates that they had been advised by Assistant U.S. Attorney Michael Reap that they were not liable if there was sufficient time and distance between their acts and the accident, the Rangers stated that Deuser was acting as if he were "lazy or somewhat intoxicated," and that Deuser "did not appear to be intoxicated." Vecera's original report also indicates that the Rangers turned Deuser over to the St. Louis City Police ending their involvement. Their supplemental report than reveals their involvement through the abandonment.

Petitioner's evidence further indicates that it is likely: (1) they traveled south on Memorial Drive, which was restricted from ordinary traffic; (2) entered the westbound lanes of the interstate, which the police vehicle was facing; (3) traveled west on Interstate 44; (4) exited at Jefferson, the first turn around available; (5) released Deuser at Interstate 44 and Jefferson, just west of the accident scene at the westbound lanes; (6) re-entered Interstate 44 at Jefferson, going in the opposite direction; and (7) returned to Memorial Drive and the fair.

Even assuming he was released at Spruce and Tucker, they removed a very intoxicated, penniless individual from his friends and transportation, placing him in a far worse situation than if they had kept him in custody, as required in their own written policies and procedures. These procedures required a Ranger who executed an arrest at the Jefferson National Expansion Memorial to transfer the prisoner to the St. Louis Police Department Holdover Facility at 1200 Clark Street. No exceptions are allowed or contemplated in the rule.

2. Various survivors of Larry Deuser filed suit against a number of defendants, including Vecera, Bridges and King pursuant to the Missouri Wrongful Death Statute[1] for their damages occasioned by Larry Deuser's death. They allege a claim for constitutional tort damages under the Fourth and Fifth Amendments pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971), against the federal rangers, and a 42 U.S.C. § 1983 violation of the Fourteenth Amendment against the police officer and the Board of Police Commissioners. The claims are based on the facts and circumstances of Deuser's release from custody.

The United States District Court for the Eastern District of Missouri[2] ruled in favor of petitioner and denied defendants' motion for dismissal or summary judgment on the basis that qualified immunity does not protect their actions under the disputed factual record. (App. p. 70). The

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[1] § 537.080 R.S.Mo. (1979) et seq.

[2] The Honorable Edward L. Filippine, United States District Court.

district court's order was predicated on the Eighth Circuit Court of Appeals six to five judge decision in Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. en banc. 1992), which by a slim vote granted summary judgment in favor of law enforcement officials.[3]

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has created incredible unprecedented law by determining that an officer is entitled to a heightened level of protection from tort liability under qualified immunity if he is busy during a function sanctioned by the government. The Court also holds that the Due Process Clause affords diminished protection to people present at such functions.

The decision in this case is directly in conflict with existing decisional law in the Eighth Circuit, the Seventh

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[3] The district court had originally granted the defendants' motion for summary judgment (App. 28, 44). On notice from the court, the parties were asked to examine what impact, if any, the Gregory case may have on the instant case. A motion for reconsideration was filed and the court vacated its prior order and denied defendants' motion for summary judgment. (App. 70).

Circuit, the Ninth Circuit and this Supreme Court, to-wit: DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989); White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992); and Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988).

Further, the opinion radically departs from the accepted and usual course of judicial decision-making and precedent to the extent that this Court's supervision is required. The Eighth Circuit paid judicial lip service to individual constitutional rights and this Court's precedential mandates by failing to consider petitioner's evidence. Factual disputes clearly exist which are quite literally brushed aside in a footnote in the decision. Considering all facts in a light most favorable to petitioners, the decision is in conflict with Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992). By failing to consider such evidence, the decision is in conflict with this Court's mandate set forth in Celotex Corporation v. Catrett, 106 S.Ct. 2548, 477 U.S. 317 (1986). This conflict generally endangers justice in the Eighth Circuit, and worked

a great miscarriage of justice to the survivors of Larry Deuser in the case at bar. That decision of the Eighth Circuit and its propensity to disregard facts in opposition to law enforcement personnel must be addressed by this Court. See, Murray v. Leyshock, 915 F.2d 1196 (8th Cir. 1990), dissent of the Honorable Judge Bright, for another example of the refusal to consider facts that attack the credibility of law enforcement personnel, at 1202:

> The majority, albeit with more elaboration than the magistrate, has likewise engaged in fact finding, rather than accept the jury's verdict. Although giving lip service to the standard that, on review, this court must view the facts and inferences in the light most favorable to the plaintiff who succeeded in obtaining the jury's favorable verdict, the majority in essence adopts the police version of the incident.

Also see, Gregory, supra, dissenting opinion written by the Honorable Judge Heaney, at 1013:

> Although the court sets forth the correct legal standards for evaluating the evidence presented below, it has neither viewed that evidence in the light most favorable to the plaintiff nor drawn all justifiable inferences in the plaintiffs' favor.

The principle question presented for review stated in its simplest form is: whether official immunity protects the

conduct of officers who in 1986 took into custody a penniless inebriated youth, removed him from a fair on federal ground, sanctioned by the federal government, thereby separating him from his friends and driver and then stranding him in an unfamiliar area far from home without assistance, causing his death near the abandonment point. The answer to this question can be found by answering two questions: was a constitutional right then clearly established to hold these officers responsible under official immunity; and, was that right violated in this case.

a. Deuser's Constitutional right not to be stranded or placed in a worse position by governmental action was clearly established on July 4, 1986.

In White v. Rochford, 592 F.2d 381 (7th Cir. 1979), the Seventh Circuit found that the plaintiffs stated a Section 1983 claim for denial of due process with facts analogous to the case at bar.

The Chicago police arrested a man for drag racing on a highway, and abandoned his passengers on the highway. The

Court held that a cause of action was stated for violation of the Due Process Clause.

Since the Seventh Circuit held that a cause of action was stated in its 1979 ruling, there was a clearly established constitutional right against stranding *seven years* before Larry Deuser's death.

In 1982, some *four years* before Larry Deuser's death, the Seventh Circuit noted its affirmance of this position. "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

In 1988, in Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988), the Ninth Circuit made a specific legal finding that in 1984 the law was clearly established that stranding a person is a violation of due process. In so doing, the court noted that the lack of precedent within the circuit did not end the inquiry of whether a constitutional right was clearly established at the time of the tort. ". . . This court held that in

the absence of binding precedent, a court must look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test. The available decisional law includes cases from state courts, other circuits and district courts." Wood, 851 F.2d at 1217. Therein, the Ninth Circuit accepted the Seventh Circuit's analysis in White v. Rochford, supra. Since White had been decided prior to the events complained, the constitutional right was clearly established for purposes of qualified immunity. The Wood court also found that a genuine issue of material fact existed whether a police officer affirmatively placed the plaintiff in a position of danger by leaving her stranded. Wood, 851 F.2d at 1219. The incident in Wood occurred two years before Deuser's death.

The Eighth Circuit incorrectly suggests that the substantive due process protection against stranding people vary according to which judicial circuit one is found. The Court held that since the *Eighth Circuit* had not decided a case holding that an officer has a duty to refrain from placing an individual in a worse situation until after Deuser was

killed, that the constitutional rights alleged to be violated were not clearly established in the confines of this circuit. *Prior to the death of Deuser,* other circuits had clearly established law that required officers not to place individuals in harm's way. The Eighth Circuit wishes to give governmental employees a free bit at the apple. Federal constitutional law governs our country. The knowledge thereof by reasonable officers must be imputed uniformly, not circuit by circuit.

It is absurd and fundamentally unfair to suggest that law enforcement gets a "free bite at the apple" in the Eighth Circuit before the right is "established" here. It is even more absurd to envision the circumstances of upholding the Court's specious distinction: had Deuser been taken across the river into Illinois from downtown St. Louis, his survivors would have been able to state a constitutional cause of action under the Eighth Circuit Court's reasoning, but in the Seventh Circuit.

The Court correctly notes that qualified immunity is not available if the officers violated a clearly established

constitutional right that should have been known by a reasonable officer. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). This is an objective test. The Court's decision departs from sound legal reasoning at this point.

The Court concludes that the conduct was reasonable because so many people were at the fair that law enforcement was unable to properly process Deuser under mandatory procedure. Sellers, 28 F.3d at 901. This holding affords officers a heightened level of qualified immunity during so-called special or exigent circumstances created by the government.[4]

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[4] The court repeatedly refers to the size of the crowd at the fair to justify the officers' decision:

"...officers David Vecera and Edward Bridges...observed fairgoer Larry Deuser, in the midst of a milling throng of some 600,000 to 750,000 persons, ..." Sellers, 28 F.3d 897.

"Because the St. Louis police department was, as a result of the fair and its attendant problems, too busy to process Deuser, the rangers, Burnett and St. Louis police officer King agreed to remove Deuser from the fair grounds..." Sellers, 28 F.3d at 898.

"The officers conduct, in light of the circumstances they faced, was not such that reasonable officers in their position would have known they were violating Deuser's constitutional rights." Sellers, 28 F.3d at 900.

"The officers were trying to control the behavior of a crowd of more than 600,000 fairgoers." Sellers, 28 F.3d at 900.

"Because of the fair, the St. Louis police department was hard-pressed to meet its most important responsibilities and was unable to engage in the routine processing of every disorderly or drunken individual." Sellers, 28 F.3d at 900.

The obvious reply to this strained effort to protect government workers is simple. If the government cannot handle an event that it plans and condones to the extent that citizens' rights are diminished, then it should either provide for more law enforcement at the event, limit the attendance, or not have it at all. Petitioner does not concede that the alleged facts relating to the large crowd and busy state of affairs is correct or properly before this Court. The Eighth Circuit assumes the size of the crowd apparently from hearsay; assumes the St. Louis City Police were too busy to process Deuser when, in fact, Officer King said he was the wrong person to process since his duty was prisoner conveyance; assumes that the Rangers had other urgent or troublesome matters to handle; or that the officers were

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". . .Deuser would be removed as a source of trouble at the fair and the officers could attend to other urgent or troublesome situations that might arise there." Sellers, 28F.3d at 900.

". . .the fact that Deuser untimely walked onto an interstate and met his death there, there do not change the calculus of the situation faced by the officers, dealing as they were with the exigent circumstances presented by the large crowd at the fair." Sellers, 28 F.3d at 900.

"In light of the circumstances in which the officers acted, we believe it plain that their actions did not violate. . ." Sellers, 28 F.3d at 900.

"The officers were swamped with work and were attempting to control an extremely large crowd." Sellers, 28 F.3d at 902. [Emphasis added.]

swamped. The Eighth Circuit on one hand engaged in creative fact finding to support a creative new defense in favor of respondents while it blatantly ignored facts supportive of liability, as set forth below. Petitioner concludes this point by observing that there exists no prior law, logic or justice supporting a constitutional rights sliding scale dependent upon "exigencies" created by government.

b. A constitutional violation did occur.

It is urged that the rangers violated the Fourth and Fifth Amendment rights of Deuser.

Rangers Vecera, Bridges and Burnett violated Larry Deuser's Fourth Amendment rights by conducting an unreasonable seizure by taking him into custody, removing him from his driver, and releasing him in an unfamiliar area far from home at night while he was extremely intoxicated and without funds or resources on the interstate highway. The purpose of the Fourth Amendment is to prevent seizures which arbitrarily and oppressively interfere with the privacy and security of individuals. United States v. Martinez-Fuerte, 428 U.S. 543, 544 (1976). "When the State takes a person into

its custody and holds them there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Youngberg v. Romeo, 457 U.S. 307, 309 (1992).

The actions of the Rangers also deprived Deuser of his due process rights guaranteed by the Fifth Amendment and such actions clearly shock the conscience. The Fifth Amendment due process clause imposes a duty on federal actors to protect or care for citizens so that the government by action does not deprive them of life, liberty or property without due process of law. The Federal Court in White v. Rochford, 592 F.2d 381 at 383 (7th Cir. 1979) stated:

> "Although it would be impossible to catalog and to describe precisely each 'liberty' interests protected by the Due Process Clause, it can hardly be doubted that chief among them is the right to some degree of bodily integrity. Among the historic liberties so protected is the right to be free from and to obtain judicial relief for unjustified intrusions on personal security." White, supra, at 383, citing Ingraham v. Wright, 430 U.S. 651, 674, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1976).

Under current law, liability can be established in a situation where harm is caused by a non-government actor, when the government played a part in *creating* the *danger* or

rendering the person *more vulnerable* to the *danger*. The United States Supreme held in DeShaney v. Winnebago County, D.D.S., 109 S.Ct. 998 (1989), at 1006:

> That the state once took temporary control of Joshua does not alter the analysis, for when they return him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all . . .

In DeShaney the Court held the state not liable for injuries rendered by Joshua's father, since there was no evidence of the state involvement placed Joshua in a more dangerous or vulnerable position. The case at bar fits the DeShaney requirement for governmental liability, as pointed out by the District Court. Here the rangers took a very drunk Larry Deuser into custody at night. They drove him away from his friends, his resources and his ride home, abandoning him without money "allegedly" on the corner of Spruce and Tucker, with instructions not to return to the fair where his friends and his only connection to home were located under threat of further arrest. They abandoned him in an area of downtown St. Louis that many sober people would avoid during the day. They may have also stranded him many

miles from his home in north St. Louis County. If, however, the Rangers abandoned Deuser at the corner of Interstate 44 and Jefferson, which is more likely, this placed him in even a worse situation. He was next to a busy interstate in an extremely intoxicated condition even further from home, his friends, his ride and the fair.

The Sellers opinion dramatically conflicts with the Eighth Circuit's very recent decisions in Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992), supra, and Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990). The Sellers court strenuously attempts to distinguish the six judge to five judge Gregory decision by stating that Gregory was not based on qualified immunity grounds but the absence of a constitutional violation. Therefore, Gregory is relied upon herein to demonstrate that constitutional violation. The Gregory court set forth the criteria relating to when the state has a due process clause duty to protect intoxicated people in the context of a 42 U.S.C. Sec. 1983 claim. A comparison of the Gregory holding and the Sellers facts create the air of precognition.

In finding no liability against the police for the deaths of the two intoxicated passengers whose driver was arrested and detained thereby allowing the passengers to drive away from the police station, the bare majority in Gregory relied upon the following facts which are uncontestedly distinguished in the case at bar: Gregory and Fields were never in custody but were passengers in the arrestee's vehicle; the state actors never exercised control over Gregory or Fields; no special relationship existed between the state actors and Gregory or Fields; the state actors did not know nor should they have known that Gregory or Fields were intoxicated and unfit to drive; and the officers did not leave Gregory and Fields stranded or in a dangerous area.

In the case at bar, it is undisputed that Deuser was in the custody of the Park Rangers and Police Officer. Being under arrest, Deuser was obviously under the control of these officers which created a special relationship between them.

There is abundant evidence that Deuser was intoxicated, from the affidavit of Dr. Martinez to the blood alcohol post mortem test, including his incoherent, unruly

conduct and the odor of intoxicants. Deuser was over twice the legal level of intoxication at the time of his death. Witnesses who knew him said that he was as intoxicated as he had ever been in his life. Urinating in public after being warned by a park ranger about his conduct of grabbing women is clearly evidence of acute and severe intoxication. There is no evidence that this conduct was typical of the conduct of Deuser and there was no evidence of prior convictions for felonies or crimes.

Finally, it is undisputed that Deuser had no money, was removed from his friend and ride home, and taken far from his home to a non-residential area and perhaps stranded near or on the highway where he was killed while acutely intoxicated. It is no surprise that he died and his friends from whom he was separated are still living today. Animals deserve better treatment than that rendered to Deuser, and the fact that the Rangers and Police claim to have been busy at the fair provides absolutely no excuse for their conduct. The fact that the Rangers come forward in their depositions and testified that Deuser was sober while writing in their reports

that he was intoxicated only destroys the credibility of the evidence submitted by the respondents, and this inconsistency standing alone raises a jury question as to all of respondents' alleged facts. In Gregory, supra, holding no liability, the Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1989), case, holding liable, was distinguished because the injured plaintiff was stranded at the site of arrest. The case at bar is even more extreme in that respondents removed the petitioner from familiar surroundings and stranded him elsewhere.

The Eighth Circuit gratuitously opines, in the face of the toxicologist's report, that Deuser was an adult male who could have called for a ride, implying that he could have taken care of himself. Sellers, 28 F.3d at 900. No evidence exists in the record to support this bare assertion. The function of the Eighth Circuit is not to give an unsubstantiated lay opinion of decedents' toxicological state, much less to disregard clearly contradictory evidence.

The Eighth Circuit disregards petitioners' contention regarding the location of abandonment as being without

merit, since "these allegations are unsupported by any evidence . . . and thus we do not consider them." See Sellers, supra, at 898, fn. 1. The petitioner prays that this honorable court consider the evidence to which the Eighth Circuit held a blind eye so that justice may prevail; so that our system can withstand the scrutiny of itself and others by demonstrating that all persons are equal under the eyes of the law and even the servants of this great republic receive no special consideration.

The location of release is an extremely important aspect of this case in determining the level of culpability of the officers. The record clearly supports reasonable differences of opinion, and summary judgment is not appropriate and creates a tremendous miscarriage of justice.

The failure of the Eighth Circuit to consider the factual matters properly before it runs afoul of this Court's mandate in Celotex Corporation v. Catrett, 106 S.Ct. 2548, 477 U.S. 317, 91 L.Ed. 265 (1986) and reeks of bias by the government in favor of its servants.

A constitutional tort has been committed. The proposition by the court to the contrary is preposterous and unsupported by the record. The Eighth Circuit further demonstrates its disregard of the decision making process by failing to explain its holding in light of petitioner's facts.

In the present case, the mandatory procedure for handling intoxicated persons in police custody was established by the St. Louis Police Department Special Order effective February 11, 1981. That order requires the officer who observes an intoxicated person to perform one of the following: take the person to the station so he can call a friend, call a taxi for him, take him to a detoxification center, or take him to the hospital or hold him until sober.

The procedure does not give the officers the discretion to fail to act or to take an intoxicated person for a ride and abandon them on the streets. Evidence revealed that it is the custom and practice of the St. Louis Board of Police Commissioners to instruct the officers to remove individuals from locations where they may be causing problems and to abandon them elsewhere. One officer testified that this

practice is even taught at the police academy in St. Louis and occurs regularly.

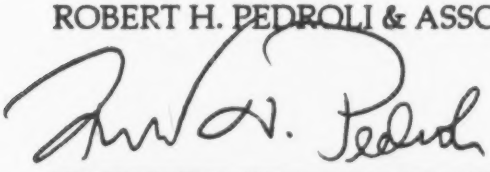
Because of the evidence of the adoption of procedures which caused this constitutional tort, the Board of Police Commissioners should also be precluded from summary judgment pursuant to the holding in Monell v. New York City Dept. Of Social Services, 436 U.S. 378, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 197, 103 L.Ed.2d 412 (1989).

CONCLUSION

The petition for writ of certiorari should be granted to settle the conflicts between the Eighth Circuit and this Court and to supervise the Eighth Circuit's departure from acceptable legal reasoning.

Respectfully submitted,

ROBERT H. PEDROLI & ASSOCIATES



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2261EMSL

TINA MARIE SELLERS, et al.,	)	
	)	
Appellees,	)	
	)	
v.	)	Order Denying
	)	Petition for
	)	Rehearing and
	)	Suggestion
ROBERT J. BAER, et al,	)	for Rehearing En Banc
	)	
Defendants,	)	
	)	
DAVID VECERA, et al.,	)	
	)	
Respondents.	)	

The suggestion for rehearing en banc is denied.

The petition for rehearing by the panel is also denied.

August 16, 1994

Order Entered at the Direction of the Court:

MICHAEL E. GANS /S/

Clerk, U.S. Court of Appeals, Eighth Circuit

Tina Marie SELLERS, By and Through her guardian, natural mother, and next friend, Joann SELLERS; Albert F. Deuser Phyllis Menke, Appellees,

v.

Robert J. BAER; John J. Frank; James E. Mosbacher; William H. Young; Mayor Vincent Schoemehl; Lawrence J. King; United States of America, Defendants,

David Vecera, National Park Ranger; Edward Bridges, National Park Ranger; Dennis Burnett, Chief Ranger, Appellants.

Tina Marie SELLERS, By and Through her guardian, natural mother, and next friend, Joann SELLERS; Albert F. Deuser Phyllis Menke, Appellees,

v.

Robert J. BAER; John J. Frank; James E. Mosbacher; William H. Young; Mayor Vincent Schoemehl; Lawrence J. King; United States of America, Defendants,

David Vecera, National Park Ranger; Edward Bridges, National Park Ranger; Dennis Burnett, Chief Ranger, Appellants.

Tina Marie SELLERS, By and Through her guardian, natural mother, and next friend, Joann SELLERS; Albert F. Deuser Phyllis Menke, Appellees,

v.

Robert J. BAER; John J. Frank; James E. Mosbacher; William H. Young; Mayor Vincent Schoemehl;

Lawrence J. King; United States of America,
Appellants,

David Vecera, National Park Ranger; Edward Bridges,
National Park Ranger; Dennis Burnett, Chief Ranger,
Appellants.

Nos. 93-2261, 93-2686, 93-3753.

United States Court of Appeals
Eighth Circuit.

Submitted Feb. 14, 1994.

Decided July 8, 1994.

Rehearing and Suggestion for Rehearing En Banc
Denied Aug. 16, 1994 in No. 93-2261

Survivors sue park rangers, police officer, and members of board of police commissioners, under § 1983, based on death of intoxicated individual who was removed from fairgrounds and released. The United States District Court for the Eastern District of Missouri, Edward L. Filippine, J., granted park rangers' summary judgment motion, but subsequently granted plaintiffs' motion for reconsideration, and denied police officer's and board's motion for summary judgment. Defendants appealed. The Court of

Appeals, Bowman, Circuit Judge, held that: (1) rangers and officer were entitled to qualified immunity; (2) ministerial/discretionary distinction did not deprive rangers and officer of qualified immunity; and (3) rangers and officer's conduct could not have amounted to denial of substantive due process.

Reversed and remanded.

Before BOWMAN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BOWMAN, Circuit Judge.

Before us are appeals from the District Court's denial of motions by certain of the defendants for summary judgment on the ground of qualified immunity. We reverse.

I.

In the evening of July 4, 1986, at the annual Veiled Prophet fair at the Jefferson National Expansion Memorial in St. Louis, two National Park Rangers, Officers David Vecera and Edward Bridges, observed fairgoer Larry Deuser, in the midst of a milling throng of some 600,000 to 750,000 persons, randomly

grabbing women by the buttocks. This conduct angered the women, and apparently some of their male companions as well. The rangers warned Deuser to keep his hands to himself, but he did not take this warning seriously. When Deuser urinated in public, the rangers arrested him. Deuser argued with the rangers and made offensive remarks to female fairgoers as the rangers escorted him to the rangers' tent on the fairgrounds.

The rangers met at the tent with Chief Ranger Dennis Burnett and decided to turn Deuser over to the St. Louis police. Because the St. Louis police department was, as a result of the fair and its attendant problems, too busy to process Deuser, the rangers, Burnett, and St. Louis police officer Lawrence King agreed to remove Deuser from the fairgrounds and set him free. Deuser was to be released far enough away from the fairgrounds that he would not have time to return to cause more trouble.

According to the rangers and King, they then took Deuser in a city police vehicle driven by King to the nearest police station, ten blocks from the

fairgrounds, pulled into the parking lot behind the federal building, and allowed Deuser to leave the vehicle. Before they released him, the officers made Deuser promise not to return to the fairgrounds. Deuser did not have any money with him when he was released.

About an hour and one-half later, at approximately 10:30 p.m., a motorist struck and killed Deuser on an interstate highway about a mile and one-half from where Deuser had been released.[1] At the time of his death, Deuser was highly intoxicated, his blood-alcohol level testing 0.214.

Tina Marie Sellers (Deuser's minor daughter through her mother) and Albert Deuser and Phyllis Menke (Deuser's parents) brought this suit in federal court, raising various state and federal claims, including claims under *Bivens*[2] against Vecera, Bridges,

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[1] The plaintiffs theorize that the officers actually released Deuser at an intersection adjacent to the location on the freeway where he was killed. The plaintiffs also allege that the officers deliberately placed Deuser in harm's way. These allegations are unsupported by any evidence in the summary judgment record, and thus we do not consider them.

[2] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

and Burnett, and under 42 U.S.C. § 1983 against, in their official capacities, King and the members of the Board of Police Commissioners of the city of St. Louis.[3] These claims allege, inter alia, that the conduct of Vecera, Bridges, Burnett, and King violated Deuser's Fifth and Fourteenth Amendment rights to substantive due process.[4]

In August 1990, the District Court granted the motion of Vecera, Bridges , and Burnett for summary judgment based on , in part, qualified immunity with respect to the *Bivens* claims. In April 1993, however, the court granted the plaintiffs' motion for reconsideration and vacated its prior order. In the same ruling, the court denied King's and the members of the Board's motions for summary judgment with

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[3] Mayor Vincent Schoemehl, who is a defendant in this case, is a member of the Board.

[4] The complaint alleges violations by the officers of Deuser's First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights. We consider only whether Deuser's Fifth and Fourteenth Amendment rights to substantive due process could have been violated, however, because the plaintiffs have failed to advance any reasonable explanation as to how any other rights protected by these constitutional amendments could have been violated by the officers.

respect to the § 1983 claims in which King claimed qualified immunity with respect to those claims and both King and the members of the Board asserted that King's conduct did not amount to a constitutional violation. In so doing, the court relied on, and factually distinguished, *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir.1992)(en banc), *cert. denied*, _U.S. , 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993). Vecera, Bridges, Burnett, and King appeal. See *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985)(allowing interlocutory appeal from denial of summary judgment motion based on qualified immunity).[5]

II.

[1.2] The moving parties are entitled to summary judgment if there is no genuine issue of material fact and they are entitled as a matter of law to judgment in their favor. *Pentel v. City of Mendota Heights*, 13 F.3d 1261, 1263 (1994). In this appeal we

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[5] The members of the Board also appeal. But as their motion for summary judgment was based on grounds other than qualified immunity, their interlocutory appeal of the District Court's denial of summary judgment as to them is not properly before us.

must decide whether the officers are entitled to summary judgment on the ground of qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Our inquiry into the qualified immunity question thus must consider both the nature of the plaintiffs' claims and the state of the law with respect to such claims.

A.

[3,4] The plaintiffs claim that Vecera, Bridges, Burnett, and King violated Deuser's Fifth and Fourteenth Amendment substantive due process rights. Although government generally has no duty under the Due Process Clause to protect individuals from harm imposed by third parties, *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195-196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), the plaintiffs allege that the officers violated Deuser's

substantive due process rights by removing him from the fair and leaving him in a parking lot while intoxicated, away from his friends, and without funds, thus placing him in a dangerous position he otherwise would not have faced.

In *DeShaney*, the Supreme Court was asked to decide whether a social services agency's failure to prevent continuing physical abuse of a child, of which the county was aware, constituted a deprivation of due process. The Court ruled that the state had no obligation to protect the child from harm caused by a third party (his father), even though the state knew of the danger faced by the child. 489 U.S. at 196-197, 200-01, 109 S.Ct. at 1006. The Court reasoned, in part, that due process acts as a limitation on the state's power to act, and does not guarantee an individual's safety or security. *Id.* at 195, 109 S.Ct. at 1003. While the Court acknowledged that a state may be obligated to protect an individual from harm imposed by a third party when the state holds the individual in custody against the individual's will, *id.* at 199-200, 109 S.Ct. at 1005, the Court reasoned that, as the child

was not in the state's custody, the state had neither played a role in creating the dangers the child faced, nor had it even taken any action that placed the child in a position worse than that in which he otherwise would have been, *id.* at 201, 109 S.Ct. at 1006. Some courts, including this one, have taken an extra analytical step and concluded that, if a state does take action that places an individual in a position of danger the individual otherwise would not have faced, the state may violate due process *See Gregory*, 974 F.2d at 1010; *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir.1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989).

Simply stating the broad outline of the constitutional right allegedly violated, however, does not end our inquiry. In *Anderson v. Creighton*, 483 U.S. 635, 636-37, 107 S.Ct. 3034, 3036, 97 L.Ed.2d 523 (1987), the plaintiffs sued a federal law enforcement officer who participated in a search of the plaintiffs' residence that allegedly violated the Fourth Amendment. The Supreme Court reviewed the holding of this Court that the officer was not entitled

to qualified immunity because, in the absence of probable cause and exigent circumstances, an individual has a clearly established right to be free in his or her home from a warrantless search. *Id.* at 640, 107 S.Ct. at 3039. The Supreme Court reversed, concluding that we had formulated our statement of the constitutional right at too high a level of generality. Instead, the Court explained,

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . .[I]n the light of pre-existing law the unlawfulness must be apparent.

Id. Thus, the Court held, the proper inquiry was the objective, fact specific question "whether a reasonable officer [in the defendant's position] could have believed [the[warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at 641, 107 S.Ct. 3039.

[5] As was the case in *Anderson*, the plaintiffs here have stated the constitutional right allegedly violated at too high a level of generality. it is particularly important for a complaint alleging a violation of substantive due process to state with particularity the precise nature of the alleged violation. *See Collins v. City of Harker Heights*, _ U.S. _____, _____, 112 S.Ct. 1061, 1068, 117 L.Ed. 2d 261 (1992). The issue in this case for purposes of qualified immunity is whether reasonable officers in the position of Vecera, Bridges, Burnett and King would have understood they were violating Deuser's constitutional rights when they removed him from the fairgrounds, where he had been making a great nuisance of himself, and set him free in a parking lot, near a police station and behind a federal building, away from his companions, without funds, and in an intoxicated state, rather than retain custody and charge him with disorderly conduct. *See Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039; *Latimore v. Widseth*, 7 F.3d 709, 712 (8th Cir. 1993)(en banc), *cert. denied*,

U.S. ____, 114 S.Ct. 1124, 127 L.Ed.2d 433 (1994). We believe the answer to this question must be no.

The officers' conduct, in light of the circumstances they faced, was not such that reasonable officers in their position would have known they were violating Deuser's constitutional rights. The officers were trying to control the behavior of a crowd of more than 600,000 fairgoers. Because of the fair, the St. Louis police department was hard-pressed to meet its most important responsibilities and was unable to engage in the routine processing of every disorderly or drunken individual. And Deuser's conduct, although obnoxious and requiring his removal from the fairgrounds, was not so threatening that it was necessary to jail him for protection of others.

Instead, the officers chose a course of action that was seemingly beneficial to Deuser, in that he would not have charges pressed against him, and beneficial to the officers and other fairgoers, in that Deuser would be removed as a source of trouble to the fair and the officers could attend to other urgent or troublesome situations that might arise there. Deuser

was an adult male, and the officers left him near a police station at approximately 9:00 p.m. on a midsummer evening, where he could have called for a ride.

Indeed, the officers may have placed Deuser in a safer position than that in which they found him. Once away from the fair, Deuser no longer was able to drink, and, given the reactions to Deuser's conduct from his displeased fellow fairgoers, Deuser may have faced a much greater risk of bodily harm had he stayed at the fair. The hindsight view of the events of July 4, 1986, and the fact that Deuser ultimately walked onto an interstate and met his death there, do not change the calculus of the situation faced by the officers, dealing as they were with the exigent circumstances presented by the large crowd at the fair.

[6] In light of the circumstances in which the officers acted, we believe it plain that their actions did not violate any constitutional principles that are clearly established under current law.[6] Accordingly,

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[6] Even if we could conclude that the plaintiffs have articulated an alleged violation of a constitutional right that is clearly established under current law, we still would have to conclude that the officers are

Vecera, Bridges, Burgess, and King are entitled to qualified immunity.

C.

Gregory, on which the District Court relied when it denied the officers qualified immunity, is not contrary to the result we reach today. In that case, a police officer stopped a driver for running a red light. The driver's two passengers, who occupied the back seat of the car, were intoxicated. The officer denied knowing of their intoxicated condition. After determining that the driver had an outstanding arrest warrant, the officer agreed to let the driver follow him to the police station to clear up the matter. The driver parked on the street at the station and went inside, leaving the passengers seated in the car. The

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entitled to qualified immunity. In 1986, the year of the events in question in this case, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992)(en banc), *cert. denied*, _____ U.S. __, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993), and *Wells v. Walker*, 952 F.2d 368 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989) had not yet been decided. It was not until we decided *Wells* in 1988 that the Circuit first included language in an opinion to the effect that a state may violate due process by placing an individual in a position of harm he otherwise would not have faced. Accordingly, the officers are entitled to qualified immunity because even the right broadly asserted in is case was not clearly established in 1986.

passengers subsequently drove away and were involved in a single-car accident in which one of them was killed, the other seriously injured. The officer was sued under § 1983 for allegedly having left the passengers in a position of danger.

The Court concluded that the plaintiffs had not offered sufficient evidence to create a triable issue on the factual question of whether the officer knew the passengers were intoxicated. The plaintiffs thus had failed to support the specific allegations they raised in their complaint and summary judgment for the officer therefore was appropriate. 974 F.2d at 1010-11. *Gregory* was not decided on the ground of qualified immunity, and the court did not express an opinion as to whether, if the plaintiffs' allegations had been factually supported, summary judgment for the officer on the ground of qualified immunity would have been in order. In the case before us, in contrast, we conclude that, even assuming the officers knew that Deuser was intoxicated, the officers' actions did not violate a clearly established constitutional right and the officers thus are entitled to qualified immunity.

The District Court distinguished the present case from *Gregory*, reasoning that the officer in *Gregory* had not taken the passengers into custody, did not place them in a position of danger, and did not have reason to know they were intoxicated. In the present case, the District Court reasoned, the officers had taken Deuser into custody and removed him from the fairgrounds, and there was a factual dispute as to whether the officers knew Deuser was intoxicated. For the reasons discussed above, we conclude that despite these distinctions between *Gregory* and this case the officers are entitled to summary judgment on the ground of qualified immunity.

We are mindful that there are cases in which allegations of deprivations of substantive due process based on police officers' decisions to place or leave vulnerable individuals in clearly dangerous circumstances have been allowed to go to trial. *See, e.g., Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989)(police officer stranded a lone woman in a high-crime area at 2:30 a.m. after arresting the driver of the car in which she was riding and impounding

the car), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979)(officer stranded three young children on a busy freeway after arresting their uncle, who had been driving the vehicle in which the children were passengers, despite the uncle's pleas to take the children to a phone booth or police station so they could call their parents.) Other courts faced with similar situations, however, have concluded that there could be no § 1983 liability. *See Walton v. City of Southfield*, 995 F.2d 1331, 1337-39(6th Cir. 1993)(discussing cases). In any event, in the present case the officers did not place or leave Deuser in circumstances that presented any clear danger to him. We hold that the conduct of the officers did not violate a clearly established constitutional right of which a reasonable officer would have known, and the officers therefore are entitled to qualified immunity.

C.

[7] The plaintiffs contend that the officers are not entitled to qualified immunity because they were

performing "ministerial," rather than "discretionary," duties. To support this argument, the plaintiffs rely upon a St. Louis police department regulation requiring the department's officers to take intoxicated individuals either to a detoxification center or a police station so they can arrange for transportation, as well as a regulation written for rangers working the fair that told the rangers which holdover facility to use for arrested individuals. We reject this contention.[7]

[8-10] The exception to qualified immunity for functions that are "ministerial" rather than "discretionary" is quite narrow. For qualified immunity purposes, a duty is "ministerial" only where the statute or regulation leaves no room for discretion - that is, it "specif[ies] the precise action that the official must take in each instance." *Davis v Scherer*, 468 U.S. 183, 196 n. 14, 104 S.Ct. 3012, 3020 n. 14, 82

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[7] In asserting liability against the members of the Board of Police Commissioners, the plaintiffs allege that the Board had a policy under which officers could choose to transport individuals away from the fairgrounds and release them. This assertion, of course, supports a conclusion that King was performing a discretionary function. We choose, however, to rest our rejection of the plaintiffs' "ministerial-duty" argument on other grounds as to all the officers, including King.

L.Ed.2d 139 (1984). In addition, the ministerial-duty exception applies only where it is the violation of the ministerial duty that gives rise to the cause of action for damages. *Id.* at 194 n. 12, 196 n. 14, 104 S.Ct. at 3019 n. 12, 3020 n. 14. The situation before us clearly does not meet the *Davis* criteria. "[I[n our view the Supreme Court's discussion of the ministerial-duty exception in *Davis* establishes that the exception is too narrow to comprehend this case." *McIntosh v. Weinberger*, 810 F.2d 1411, 1432 (8th Cir. 1987), *vacated and remanded on other grounds sub nom. Turner v. McIntosh*, 487 U.S. 1212, 108 S.Ct. 2861, 101 L.Ed.2d 898 *and cert. denied*, 487 U.S. 1217, 108 S.Ct. 2870, 101 L.Ed.2d 905 (1988).

In the case before us the plaintiffs make no claim that they are entitled to damages simply because the regulations they cite were violated. Instead, they seek damages based on their claims that the Fifth and Fourteenth Amendments were violated. Thus, the issue before us is whether the officers' conduct violated any clearly established constitutional rights, not whether the officers may

have violated departmental regulations. *See Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993). Even assuming that the officers violated the departmentally imposed duties and that the duties were purely ministerial,[8] the officers still are entitled to qualified immunity.

[11] Additionally, we note our belief that the ministerial-duty exception to the qualified immunity defense is dead letter. First, we have been unable to find any post-*Davis* cases in which a court has denied qualified immunity because the official was performing a ministerial task. Furthermore, in light of the limitations placed on the exception by *Davis*, we are unable to imagine the case in which the ministerial-duty exception ever could apply. Other circuits also have expressed skeptical views of the distinction between discretionary and ministerial duties. *See Horta v. Sullivan*, 4 F.3d 2, 12 (1st

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[8] The officers were swamped with work and were attempting to control an extremely large crowd. Because there is no evidence that the cited regulations were intended to govern the conduct of officers in all situations, we are not persuaded, and do not intend to suggest, that the officers lacked discretion to decide what to do with disorderly individuals they encountered at the fair. *See supra* note 7.

Cir.1993)("[I]nsofar as the concept of discretionary function is relevant at all in the immunity sphere, ..."), *Gagne v. City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986)("Thus allegations about the breach of a statute or regulation are simply irrelevant tot he question of an official's eligibility for qualified immunity in a suit over the deprivation of a constitutional right."), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987); *Coleman v. Frantz*, 754 F.2d 719, 727 (7th Cir.1985) ("[A]s a matter of public policy, it would be unwise to engage in a case by case determination of Section 1983 immunity based upon the ministerial versus discretionary nature of the particular official act challenged.").

III.

[12,13] Finally, we believe the record demonstrates not only that the officers are entitled to qualified immunity, but also that they did not violate Deuser's constitutional rights. The plaintiffs allege that the officers intentionally, willfully, recklessly, and grossly negligently placed Deuser in a position of

greater danger. Gross negligence on the part of the officers - even assuming their conduct rose to such a level - is not actionable under *Bivens* or § 1983. *Myers v. Morris*, 810 F.2d 1437, 1468 (8th Cir.), *cert. denied*, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987). After carefully reviewing the record and in light of the above discussion, we hold as a matter of law that no reasonable fact-finder could conclude that the officers intentionally, willfully, or recklessly placed Deuser in a position of greater harm when they removed him from the fairgrounds and released him behind the federal building in a parking lot adjacent to the police station. Accordingly, the officers' conduct could not have amounted to a denial of Deuser's substantive due process rights. *See Gregory*, 974 F.2d at 1010; *Wells*, 852 F.2d at 370.

IV.

[14] The plaintiffs also claim that the members of the Board violated Deuser's constitutional rights by encouraging its officers to remove individuals from the

fair and release them off the fairgrounds. Citing *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed. 412 (1989), the members of the Board, attempting to appeal the District Court's denial of their motion for summary judgment, argue that their policies did not cause Deuser's injuries and that the policies were not enacted with the mental state necessary for liability to be imposed.

[15] As mentioned earlier in this opinion, the members of the Board did not seek summary judgment on the ground of qualified immunity, and we therefore lack jurisdiction over their interlocutory appeal of the District Court's order. *See supra* note 5. Thus the appeal of the members of the Board must be dismissed.[9] However, because of our holding that Deuser's constitutional rights were not violated, the plaintiffs' § 1983 claims against the members of the Board necessarily must fail, and on remand the members of the Board will be entitled to dismissal of

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[9] Similarly, King's appeal from the District Court's denial of his motion for summary judgment with respect to the plaintiffs' state-law claims is not properly before us in this interlocutory appeal, and is dismissed.

those claims. *See Cole*, 993 F.2d at 1334 ("A vital element of any section 1983 claim is a showing that a right secured by the Constitution or federal law was violated."); *Gregory*, 974 F.2d at 1012 ("Having concluded [the officer] did not violate [the plaintiffs'] constitutional rights, the [plaintiffs] cannot press a claim against the City . . . .").

V.

We reverse the District Court's order denying summary judgment for Vecera, Bridges, Burnett, and King on the ground of qualified immunity, direct that their motions for summary judgment on the plaintiffs' constitutional claims he granted and that the *Bivens* claims against Vecera, Bridges, and Burnett and the § 1983 claims against King be dismissed, direct that the § 1983 claims against the members of the Board be dismissed because Deuser's substantive due process rights were not violated, and remand for further proceedings consistent with this opinion.

A true copy.

Attest: MICHAEL E. GANS /S/
Clerk, U. S. Court of Appeals,
Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS,	)	
Plaintiff,	)	
v.	)	No.88-1270 C(2)
ROBERT J. BAER, JOHN J. FRANK JAMES E. MOSBACHER, WILLIAM H. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and V.P. FAIR FOUNDATION,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion to amend her petition. Also pending are motions of defendants Vecera, Bridges and Burnett ("Rangers") to dismiss Count II of the second amended complaint or for summary judgment and to quash notice of deposition of

defendant Burnett. The Department of Interior and Burnett have moved for a protective order related to Burnett's scheduled deposition. The Veiled Prophet Fair Foundation ("V.P. Fair Foundation') has moved for summary judgment[1]

The Court will briefly review the factual allegations. Larry Deuser was taken into custody on the grounds at the V.P. Fair on July 4,1986, for urinating in public. Instead of arresting Deuser, a police officer and two Rangers took him away from the fairgrounds and dropped him off on the streets of St. Louis. Thereafter, Deuser was hit by a car and killed. His daughter, Tina Marie Sellers, has brought a four-count suit.

In Count I, plaintiff has sued Lawrence King, Robert Baer, John Frank, James Mosbacher, William Young and Mayor Vincent Schoemehl under 42 U.S.C. § 1983 and the Missouri Wrongful Death Statute, Mo. Rev. Stat. § 537.080

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[1] Prior to filing its motion for summary judgment, V.P. Fair Foundation asked for leave to file its first amended separate answer to the second amended complaint. Since the Court will grant V.P. Fair's motion for summary judgment, the motion for leave to file an amended answer will be denied as moot.

(1986) for wrongfully leaving Deuser in a location away from any communication or means of transportation when they knew or should have known that he could not provide for his own safety.

In Count II, plaintiff has sued the Rangers under **Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics**, 403 U.S. 388 (1971).

Count III is against Izear Polk, the driver of the car that hit Deuser. This matter has been settled.

Finally, in Count IV, plaintiff brings suit against the V.P. Fair Foundation under the Missouri Wrongful Death Statute.

The first matter to be addressed by this Court is whether plaintiff should be granted leave to file her third amended complaint. The third amended complaint is the same as the second amended complaint, except that Count II against Polk has been replaced by a new count against the Rangers. Count III of the third amended complaint is in the alternative to Count II and states a claim under the Federal Tort Claim Act ("FTCA"), 28 U.S.C. §§ 2671-2680, for the wrongful death of Deuser.

Tort claims against the United States have to be presented in writing to the appropriate federal agency within two years after such action is begun or within six months after the date of mailing of notice of a final denial of the claim by the agency to which it was presented. See 28 U.S.C. § 2401(b). The Rangers assert that Count III was not timely filed. Plaintiff disagrees, citing to the 1988 amendment to the FTCA. Pub.L. 100-694, 102 Stat. 4563.

The Court does not take issue with the possibility that plaintiff's tort claim action against the Rangers may be foreclosed; however, given the liberal amendment policy reflected in Federal Rule of Civil Procedure 15(a), the Court will grant plaintiff leave to file her third amended complaint.[2] The ruling granting plaintiff leave to file her third amended complaint will not work to foreclose defendants from bringing any subsequent motions on the limitations matter which they feel are appropriate.

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[2] Plaintiff agrees that the present motions for summary judgment can be applied to the third amended complaint.

A hearing was held on the Rangers' motion for summary judgment. They assert that Count II should be dismissed because plaintiff fails to state a claim for a violation of a constitutional right and because they are protected by qualified immunity.[3]

When evaluating a motion for summary judgment, the Court must view the facts in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from the facts. **Portis v. Folk Construction Company, Inc.**, 694 F.2d 520, 522 (8th Cir. 1982). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believed demonstrate the absence of genuine issue of

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[3] The Rangers also move for summary judgment on the ground that plaintiff cannot establish a causal connection between the Rangers' action and the complained of injury Since the Court has decided to grant the Rangers' motion for two other reasons, the casuality argument will not be addressed.

material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248. The burden on the moving party is discharged by showing "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325.

In Count II of her third amended petition, plaintiff alleges that she is the natural daughter of Larry P. Deuser. She claims that on April 4, 1986, National Park Rangers David Vecera and Edward Bridges took her father into custody at the V.P. Fairgrounds in St. Louis, Missouri. Following instructions by Chief Ranger Dennis Burnett, Vecera and Bridges, with the help of a St. Louis Police officer, released Deuser some ten blocks from the fairgrounds on the streets of St. Louis. The defendants released Deuser without giving him an opportunity to arrange for transportation or to contact friends. Plaintiff contends that

the actions were taken even though Deuser was intoxicated and had no money. Plaintiff argues that as a direct result of the Rangers' conduct, Deuser was struck and killed by an automobile on Interstate 44 in St. Louis, Missouri.

It was July 4, 1986, and the fairgrounds was full of people who had gathered for the Independence Day festivities. During the early evening, Vecera observed Deuser grabbing women's buttocks at random. Bridges joined Vecera and they approached Deuser. They gave him a oral warning to cease his inappropriate behavior. Deuser was not taken into custody, but the Rangers decided to keep a close watch on him. Shortly thereafter, Deuser urinated in public. Vecera and Bridges approached Deuser, handcuffed him and brought him to the "field tent."

At the field tent, Burnett was informed about the incident that led up to Deuser's detention. The Rangers decided that it was best to turn Deuser over to the St. Louis Police. St. Louis Police Officer Lawrence King informed the Rangers that the St. Louis Police Department was too busy to process Deuser. The parties decided that it would be best to take Deuser away from the fairgrounds and then release

him. King, Vecera, and Bridges put Deuser in a St. Louis Police van.

Defendants have submitted affidavits and other materials showing that King, Vecera and Bridges drove Deuser to the rear of the Federal Building on Thirteenth Street at Spruce. Bridges removed the handcuffs from Deuser. Deuser was released after receiving a strong verbal warning about his behavior from Vecera. An hour and half after the Rangers released Deuser, he was killed. The spot where the Rangers dropped Deuser off was over a mile and half from where he was killed.

Under Rule 56(e), a party opposing a motion for summary judgment may not rest upon the allegations of his pleadings but "must set forth specific facts showing there is a genuine issue for trial." Fed.R.CivP. 56(e). Plaintiff has come forth with evidence of three issues which she claims reveal material fact disputes which are significant to this Court's determination of the present summary judgment motion. The first dispute concerns the amount of time that passed between the time Rangers freed Deuser until the time he was struck by the automobile on Interstate 44. The

second dispute pertains to where Deuser was actually dropped off. The third dispute concerns whether Deuser was too drunk to fend for himself when the Rangers dropped him off.

Plaintiff has not met her burden under rule 56(e) as to the first two issues. Plaintiff has sought to convince this Court by rather tenuous reasoning that there was only a ten minute gap between the time Deuser was dropped off until the time he was killed. Plaintiff, using the same type of unsubstantiated attenuated reasoning, seeks to persuade this Court that Deuser may have been left somewhere other than where the Rangers attested to dropping him off. There is not a shred of tangible evidence to support plaintiff's position on the first two issues; whoever, for purposes of this motion, the Court will assume that Deuser was extremely intoxicated.

Damage suits can be maintained against federal officials in their individual capacity for violations of Constitutional rights. See Bivens, 403 U.S. 388 (1971). Failure to state such a compensable claim for relief under the federal Constitution will result in a dismissal. Id., at 507-08.

An action under **Bivens** is almost identical to an action under § 1983. As stated by the Court in **Butz v. Economy**, 438 U.S. 478, 504 (1978), "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."

The first point raised by the Rangers is that plaintiff failed to state a claim for a violation of a constitutional right. Plaintiff claims that the Rangers violated Deuser's Constitutional rights by "wrongfully, recklessly, grossly negligently and without due process of law" releasing the decedent in a dangerous location when they knew or should have known that he was not in a proper condition to care for his own safety and the safety of others around him.[4]

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[4] Plaintiff asserts violations of Deuser's rights guaranteed by the First, Fourth, Fifth and Eighth Amendments to the United States Constitution. Plaintiff's allegations focus on the release of Deuser, not on the period he was held by the Rangers. Therefore, while plaintiff cites to the first, fourth and eighth amendments, she fails to assert any facts which evidence a possible violation of rights protected by those amendments. Therefore, this Court will examine plaintiff's claim only under the fifth amendment.

Viewing the facts in a light most favorable to plaintiff, the Court concludes that although the Rangers might have been negligent in dropping Deuser off instead of brining him to jail, mere negligence or lack of due care does not trigger the protection of the fifth amendment and therefore does not state a claim under **Bivens**. **See Daniels v. Williams**, 474 U.S. 327, 330-32 (1986); **Davidson v. Cannon**, 474 U.S. 344, 347 (1986).

The Court has considered the Ninth Circuit case of **Wood v. Ostrander**, 879 F.2d 583 (9th Cir. 1989). In that case, Linda Wood brought a § 1983 claim against a Washington State Trooper. One evening at 2:30 a.m., the trooper pulled over a car in which Wood was a passenger. The officer arrested the driver for driving while intoxicated. The trooper took the keys to the car, called for a tow truck, and left Ms. Wood to fend for herself in an area with the highest aggravated crime rate in the county outside the City of Tacoma. The temperature was fifty degrees and Wood was wearing only a blouse and jeans. After walking for about one-half a block, Wood accepted a ride from a stranger who later raped her. Unlike the present case, the

Wood Court found that the trooper acted with deliberate indifference to Wood's interest in personal security. 879 F.2d at 588. See generally **Wideman v. Shallowford Community Hospital., Inc.**, 826 F.2d 1030 (11th Cir. 1987); **DeShaney v. Winnebago County Department of Social Services**, _ U.S. _ _____, 109 S.Ct. 998 (1989).

The Rangers' motion for summary judgment could also be granted on qualified immunity grounds. In **Harlow v. Fitzgerald**, 457 U.S. 800 (1982), the Court determined that the matter of immunity may be determined on summary judgment. The burden is on the Rangers to establish that they are entitled to qualified immunity. The standard is objective - the Rangers are entitled to summary judgment if they can show that reasonable officers in their position would have believed their actions were constitutional even if they were not. **Anderson v. Creighton**, U.S. _, 107 S.Ct. 3034, 3040 (1987).

In deciding whether the Rangers are entitled to qualified immunity, the Court considers whether it was objectively reasonable for the Rangers to believe that picking up an intoxicated person who was causing problems

at the fairgrounds and moving him to a relatively safe area of town, even though it meant taking that person from his friends, was violative of that person's constitutional rights. As stated in **Malley v. Briggs**, 475 U.S. 335, 341 (1986), qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." The Rangers were neither plainly incompetent, nor did they knowingly violate the law. They made a decision which was objectively reasonable; and, therefore, they are entitled to qualified immunity.

Defendant V.P. Fair Foundation has moved for summary judgment. In Count IV of the third amended complaint, plaintiff has brought an action under the Missouri Wrongful Death Statute. Plaintiff alleges that V.P. Fair Foundation negligently failed to provide protection and safety to patrols who attended the July 4 festivities. Plaintiff further alleges that the V.P. Fair Foundation directed the police officers and Rangers to remove certain persons from the fairgrounds without making arrests.

The Court has considered the depositions of Officer King, Ranger Bridges, Ranger Vecera, the affidavit of

Calzona Hall (Lieutenant Colonel with the St. Louis Police Department and Deputy Chief of Field Operations for the 1986 V.P. Fair), the contract between the City of St. Louis and the V.P. Fair Foundation, and the Special use Permit issued by the United States Department of the Interior to the City of St. Louis and finds the following facts are material and undisputed.

No agent, servant, employee or representative of the V.P. Fair Foundation had any contract with Larry Deuser. During the 1986 V.P. Fair, the fairgrounds was patrolled by officers of the St. Louis County Police Department and Rangers of the National Park Service. The St. Louis Police Department determined how many police officers would be assigned to the V.P. Fair and how the officers would be deployed. The V.P. Fair Foundation had no control over, nor in any way directed, the police officers working at the fairgrounds.

In response to the V.P. Fair Foundation's motion for summary judgment, defendant argues that V.P. Fair Foundation, as the provider of public amusement, had a duty to exercise reasonable care to keep the place of public

amusement in a reasonably safe condition for the invitee's use. See **Hughes v. St. Louis National Baseball Club**, 224 S.W.2d 989 (Mo.banc 1949). Given the undisputed facts, defendant V.P. Fair exercised reasonable care in providing for the safety of the public. It also had no direct connection with Deuser's death. Therefore, the V.P. Fair Foundation's motion for summary judgment will be granted.

All the motions concerning whether Burnett should be deposed will be denied. Burnett should be made available for deposition immediately. The present trial setting of September 4, 1990, will be vacated and reset.

Accordingly,

IT IS HEREBY ORDERED that plaintiff is granted leave to file her third amended complaint.

IT IS FURTHER ORDERED that the separate motion of defendants Vecera, Bridges and Burnett for summary judgment on Count II of the third amended complaint is **GRANTED.**

IT IS FURTHER ORDERED that the trial setting of September 4, 1990, is **VACATED.**

IT IS FURTHER ORDERED that the motion of defendants Bridges, Vecera and Burnett to quash the notice of deposition of defendant Burnett is **DENIED.**

IT IS FURTHER ORDERED that the separate motion of defendant Burnett for a protective order is **DENIED.**

IT IS FURTHER ORDERED that the motion of Department of Interior for protective order is **DENIED.**

IT IS FURTHER ORDERED that defendant V.P. Fair Foundation's separate motion for leave to file first amended answer to the second amended complaint is **DENIED** as moot.

IT IS FURTHER ORDERED that defendant V. Fair Foundation's motion for summary judgment is **GRANTED.**

An appropriate judgment shall accompany this memorandum and order.

Dated this 24th day of August, 1990.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS,	)	
Plaintiff,	)	
v.	)	No.88-1270 C(2)
ROBERT J. BAER, JOHN J. FRANK JAMES E. MOSBACHER, WILLIAM H. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and V.P. FAIR FOUNDATION,	)	
Defendants.	)	

JUDGMENT

In accordance with the memorandum and order filed this day and incorporated herein,

IT IS HEREBY ORDERED AND ADJUDGED that David Vecera, Edward Bridges and Dennis Burnett shall

have judgment against Tina Marie Sellers on Count II of her third amended complaint and that Count II of the third amended complaint is **DISMISSED.**

IT IS FURTHER ORDERED that the V.P. Fair Foundation shall have judgment against Tina Marie Sellers and that Count IV of the third amended complaint is **DISMISSED.**

Dated this 24th day of August, 1990.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS,	)	
Plaintiff,	)	
v.	)	No.88-1270 C(2)
ROBERT J. BAER, JOHN J. FRANK JAMES E. MOSBACHER, WILLIAM H. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and V.P. FAIR FOUNDATION,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motion of defendants National Park Rangers David Vecera, Edward Bridges, and Dennis Burnett ("Rangers") to dismiss Count III of the third amended complaint. Plaintiffs have moved for

leave to file a fourth amended complaint and to reconsider. The defendants that comprise the Board of Police Commissioners and defendant King have filed separate motions for summary judgment.

The facts of this case are set out in this Court's order of August 24, 1990, and need not be repeated in detail; however, they will be briefly reviewed. On April 4, 1986, Vecera and Bridges took Larry P. Deuser into custody at the Veiled Prophet Fair ("VP Fair") in St. Louis for urinating in public. They took Deuser to a field tent located on the fairgrounds. At the field tent, Chief Ranger Burnett was informed about the incident that led up to Deuser's detention. After some discussion with St. Louis Police Officer Lawrence King, it was decided that it would be best to take Deuser away from the fairgrounds and then release him. King, Vecera, and Bridges put Deuser in a St. Louis Police van and took him to the rear of the federal building on Thirteenth Street at Spruce where he was released. Thereafter, Deuser was struck and killed on a highway in St. Louis.

In the August 24, 1990, order, the Court granted a summary judgment motion brought by Vecera, Bridges, and Burnett and dismissed plaintiffs' substantive due process claim against them because, viewing the facts in a light most favorable to the plaintiffs, the Court concluded that the Rangers' actions, at most, amounted to mere negligence. On December 12, 1990, the Court contacted the parties and informed them that a decision had been reached in the case of **Gregory v. Rogers**, 921 F.2d 750 (8th Cir. 1990). The Court suggested that the parties read the opinion of the court of appeals; and, if they felt it impacted on this case, they could file whatever motions they deemed appropriate. Plaintiffs responded by filing a motion to reconsider.

The facts of **Gregory** are as follows. In the early morning of March 30, 1986, police officer Ronnie Howell stopped a car driven by Stanley Turner for running a red light. Turner, who was sober, was driving two friends home who were drunk. A warrant check of Turner revealed an outstanding warrant for his arrest. Although there was

no evidence that Officer Howell initiated an investigation of the identity or condition of the passengers in the car, there was evidence that he did know of their intoxicated condition. Officer Howell took Turner into custody, instructing him to drive the car and follow him to the police station to clear up the matter of the warrant. Turner followed those instruction and, upon arriving at the police station, he was detained. The passengers were left in the car. One of the passengers started the car, and the two drove away. Not long thereafter, the car was involved in an accident. One of the passengers died and the other sustained extensive injuries. Both were legally drunk at the time of the accident.

The court first considered whether the passengers established a right under the fourteenth amendment to be protected from harm. Finding that they did, the court went on to find that the plaintiff's raised questions of fact as to whether or not Officer Howell's conduct was reckless. In February, 1991, the court of appeals granted appellees' motion for rehearing and on May 13, 1991, the court heard oral argument. An en banc

decision by the Eight Circuit Court of Appeals in Gregory would not only prove beneficial in deciding upon plaintiffs' motion to reconsider, it would also provide guidance on the separate motions for summary judgment of the defendant that comprise the Board of Police Commissioners and defendant King. Thereafter, the Court will stay ruling on those motions until the court of appeals sitting en banc reaches a decision in Gregory.

In Count III of the third amended complaint, plaintiffs assert a claim against the Rangers under the Federal Tort Claims Act ("FTCA") 28 U.S.C. §§ 2671-80. The Rangers have moved to dismiss Count III and for summary judgment. Plaintiffs have moved to dismiss Count III and for summary judgment. Plaintiffs have sought leave to amend their complaint to add the United States as a party defendant. The motion is opposed on the ground that plaintiffs failed to present their tort claim against the United States in writing to the appropriate federal agency within two years after such claim accrued and, therefore, it is barred by 28 U.S.C. § 2401(b).

The Rangers' motion to dismiss, or, in the alternative, for summary judgment and plaintiffs' motion for leave to amend require the Court to consider the effects of amendments made to the FTCA by the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Act"), Public Law 109-694, 102 Stat. 4563 (1988).

The purpose of the Act is to provide immunity for federal employees from personal liability for common law torts committed within the scope of their employment. Prior to the decision in Westfall v. Erwin, 484 U.S. 292 (1988), the FTCA made the United States responsible for common law torts of federal employees acting within the scope of their employment, while the case law had made federal employees generally immune from personal tort liability. The Westfall opinion held that a federal employee was not immune from suit unless the challenged conduct is "within the outer perimeter of an official's duties" and is "discretionary in nature." Id. At 300. Fearing that "the possible exposure of Federal employees to personal liability could lead to a substantial diminution in the vigor of Federal

law enforcement and implementation," the House Committee Report proposed and Congress adopted the Act. 1988 U.S. Code Cong. & Admin. News 5945, 5947. Most of the Act is codified in 28 U.S.C. 2679.

The remedy against the United States under the FTCA for "death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim. . . . Any other civil action or proceeding for money damages arising out of or relating tot he same subject matter against the employee . . . is precluded without regard to when the act or omission occurred." 28 U.S.C. § 2679(b)(1) (emphasis added). Actions alleging constitutional torts or federal statutory torts do not fall within the purview of the FTCA. 28 U.S.C. § 2679(2).

Under the Act, if the Attorney General certifies that an employee was acting within the scope of his or her

employment, an action brought in a federal district court "shall be deemed" to be against the United States, which shall be substituted as party defendant. If the Attorney General refuses to certify scope of employment, "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." Upon certification, the case is then to proceed in the manner as nay action against the United States filed pursuant to 28 U.S.C. § 1346(b) "and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2674(4).

One such limitation is that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). Section 8 of the Act provides that the effective date of the statute is the date of the Act's enactment, which was on November 19, 1988. It

also provides that the amendments "made by the Act shall apply to all claims, civil actions, and proceedings pending on, or filled on or after" November 19, 1990. Section 8(d) speaks to claims that accrued before the enactment of the Act, it reads:

> With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under the applicable State law, but in no event shall such period exceed two years from the date of the enactment of the Act.

In their motion to dismiss Count III of the third amended complaint and for summary judgment, the Rangers contend that since they were acting within the scope of their employment plaintiffs should have brought suit against the United States, not them. The Rangers' motion is not well taken. The Act makes clear that the Rangers should request that the Attorney General certify that they were acting within the scope of their employment. If he refuses, then the Rangers can file a motion for such

certification pursuant to 28 U.S.C. § 2679(3). See **Egan v. United States**, 732 F.Supp. 1248 (E.D.N.Y. 1990). Therefore, the Court will deny the Rangers' motion to dismiss.

The Rangers also move to dismiss because they were not properly served. Essentially, the Rangers argue that when this Court granted their motion for summary judgment, they were no longer in this case and needed to be served again. What counsel fails to recognize is that the Court granted plaintiffs leave to file their third amended complaint at the same time it granted the Rangers' summary judgment motion. The Court took the Rangers' motion as directed to Count II of the third amended complaint to save them the time and expense of having to refile their motion for summary judgment. When the Court entered judgment, it was to Count II of the third amended complaint. This left Count III of the third amended complaint still pending against the Rangers. Therefore, the Rangers' motion to dismiss on this point will be denied.

In their alternative motion for summary judgment, the Rangers once again attempt to convince the

Court that no material facts are in dispute and that Deuser was not drunk when he was dropped off near the Federal Building. In the August 24, 1990, order, the Court found that there were material facts in dispute on this point. The Court has once again reviewed the evidence and will not reconsider that finding. Under the circumstances, plaintiffs' alternative motion for summary judgment will be denied.

As to the plaintiffs' motion for leave to file their fourth amended complaint, the government objects to that motion on the ground that plaintiffs did not file their administrative claim against the United States in writing to the appropriate federal agency within two years after such claim accrued and therefore it is barred. Under Section 8(d) of the Act, plaintiffs' FTCA claim could be timely filed within the period allowed for filing an action under the applicable state law but in no event later than two years from November 19, 1988, the date of the enactment of the Act. In the legislative history of the Act, examples are given on how Section 8(d) applies to certain claims. One example is remarkably similar to the present case. It reads: "For

example, if the claimant was injured six months before the date H.R. 4612 [the Act] was enacted, and the state statute of limitations was three years, the claimant would have two years from the date of enactment within which to file an administrative claim against the United States." 1988 U.S.Code Cong. & Admin. News at 5953 fn. 2.

Plaintiffs' claim accrued on July 4, 1986. Since their wrongful death action has a three year statute of limitations, Mo.Rev.Stat. § 537.100 (1986), plaintiffs had until July 4, 1989, to file their claim. On June 29, 1989, plaintiffs filed an administrative claim with the Department of Interior, National Parks Service. The federal agency failed to make a disposition of the claim within six months after it was presented; and, therefore, on March 26, 1990, plaintiffs sought leave to amend their complaint to assert an FTCA claim.[1] The claim was brought within the time permitted under the amendments to the FTCA; and, given the liberal amendment policy reflected in Fed.R.Civ.P. 15(a), plaintiffs'

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[1] According to plaintiffs, as of January 14, 1991, the Department of Interior, National Parks Service, had not yet made a final disposition or decision on their claim.

request for leave to file their fourth amended complaint will be granted.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion to file fourth amended complaint is **GRANTED.**

IT IS FURTHER ORDERED that plaintiffs' motion for reconsideration and revision of this Court's August 24, 1990, judgment, defendant King's motion for summary judgment, and the motion for summary judgment of defendant Board of Police Commissioners are stayed pending a decision by Eighth Circuit Court of Appeals sitting en banc in **Gregory v. Rogers.**

IT IS FURTHER ORDERED that the separate motion of defendants Vecera, Bridges, and Burnett to dismiss Count III of the third amended complaint and for summary judgment is **DENIED.**

Dated this 15th day of July, 1991.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS,	)	
Plaintiff,	)	
v.	)	No.88-1270 C(2)
ROBERT J. BAER, JOHN J. FRANK JAMES E. MOSBACHER, WILLIAM H. YOUNG, MAYOR VINCENT SCHOEMEHL, LAWRENCE J. KING, DAVID VECERA, EDWARD EDWARD BRIDGES, DENNIS BURNETT, and UNITED STATES OF AMERICA,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on various pretrial matters.

On July 4, 1986, defendants Vecera and Bridges took plaintiffs' decedent Larry Deuser into custody on the grounds the V.P. Fair for urinating in public. Deuser was taken first to a field tent located on the fairgrounds. After discussion with defendant King, it was decided the best

course of action was to remove Deuser from the fairgrounds and then release him. King, Vecera, and Bridges put Deuser in a van and took him to the rear of the federal building on Thirteenth Street at Spruce where he was released. Thereafter, Deuser was struck and killed by a car on Interstate 44 in St. Louis.

Plaintiffs' fifth amended complaint is in two counts. Named defendants in Count I are Lawrence J. King, Robert J. Baer, John J. Frank, James E. Mosbacher, William H. Young, and Mayor Vincent Schoemehl. King is a St. Louis police officer. The remaining defendants in Count I are members of the Board of Police Commissioners for the City of St. Louis. Count I is brought pursuant to Mo.Rev.Stat. ¶ 537.080 and 42 U.S.C. § 1983.

Named defendants in Count II are National Park Service Rangers David Vecera, Edward Bridges, and Dennis Burnett ("Rangers"), and the United States of America. Count II is brought pursuant to Mo.Rev.Stat. § 537.080 and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. Additionally, plaintiffs state they "have a cause of action under the United States Constitution and

pursuant to **Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics**, 403 U.S. 388 (1971) and 42 U.S.C. section[ ] 1983" as pled in Count II of plaintiffs' third amended complaint. By this Court's order filed on August 24, 1990, the Rangers' motion for summary judgment on Count II of the third amended complaint was granted. Plaintiffs filed a motion for reconsideration and revision of the August 24 order after a petition for rehearing was granted in **Gregory v. Rogers**, 921 F.2d 750 (1990), vacated and reh'g en banc granted, 939 F.2d 524 (8th Cir. 1991).

Plaintiffs filed their fifth amended complaint on September 23, 1991. Defendants King and the Board filed motions for summary judgment prior to the filing of the fifth amended complaint. For that reason they filed a motion to refile their motions for summary judgment. That request will be granted and the Court will consider the motions as directed toward the fifth amended complaint.

The Attorney General has moved pursuant to 28 U.S.C. § 2679(d)(1) to substitute the United States of America for defendants Vecera, Bridges, and Burnett. The remedy under the FTCA for "death arising or resulting from

the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee who act or omission gave rise to the claim . . . . Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee . . . is precluded without regard to when the act or omission occurred." 28 U.S.C. § 2679(b)(1). Actions against federal government employees for violations of the federal constitution or a federal statute do not fall within the FTCA. 28 U.S.C. § 2679(b)(2). Under § 2679(d)(1), "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . . [the action] shall be deemed an action against the United States under the provision of this title . . . and the United States shall be substituted as the party defendant."

Since the Attorney General's motion provides the certification required by § 2679(d)(1), the motion will be granted. The United States will be substituted for the Rangers in the FTCA claim in Count II. However, since Count II states other claims against the Rangers, they will not be dismissed from the case entirely.

By its motion filed on September 30, 1991, the Untied States requests up to twenty days after the Court rules its petition to substitute in which to respond to the fifth amended complaint. The motion will be granted.

The United States has filed a motion for physical examination pursuant to Fed.R.Civ.P. 35. Under Rule 35, on motion for good cause shown, the court may order a physical examination when the physical condition, including the blood group, of a party is in controversy. By its motion, the United States seeks an order requiring Tina Sellers, Joann Sellers, Albert Deuser, and Phyllis Menke to provide blood samples so that DNA tests can be conducted to determine the paternity of Tina Sellers. The United States denies plaintiffs' allegation that Tina Sellers is the natural

daughter of Larry Deuser. Thus, the United States contends the physical condition of Tina Sellers is in controversy.

To support its motion, the United States relies mainly on the deposition testimony of Joann Sellers. The testimony indicates that Joann Sellers and Larry Deuser were not married; Joann was seventeen and living with her parents when Tina was born; Joann continued living with her parents after Tina was born; Joann Sellers and Larry Deuser did not live together for any extended period of time; and Deuser did not provide regular support to Tina on a scheduled basis. Additionally, the Untied States notes that Tina Sellers' birth certificate does not list a father. The Untied States' argument is summarized by its statement that the testimony shows "the decedent's relationship with the natural mother and [Tina] was not consistent with a father-daughter relationship between the decedent and [Tina]."

In reply to the motion for physical examination, plaintiffs filed a motion for protective order and for sanctions. Plaintiffs contend that in this Court's memorandum filed on August 10, 1989, approving the settlement between Izear Polk and Tina Sellers, this Court

determined that Larry Deuser was Tina's natural father. Plaintiffs also state that the Social Security Administration has made the same determination. Additionally, plaintiffs assert that the United States has "not supplied the Court with one fact indicating paternity is at issue." Characterizing the motion for physical examination as "baseless, [and] filed in bad faith and as pure harassment," plaintiffs seek attorney's fees for replying to the motion.

As noted by the United States, the August 10, 1989, memorandum specifically states "[t]he approval of settlement and judgment as to defendant Izear Polk . . . does not adjudicate plaintiff's claims for relief arising out of the death of Larry Deuser as to any other named defendant." Furthermore, plaintiffs provided no authority for their contention that the Social Security Administration's decision is binding on this Court.

Tina Sellers' right to bring this action under Mo.Rev.Stat. § 537.080 is dependent on her status as the daughter of Larry Deuser. Whether she is in fact Deuser's daughter remains an issue in this case. Furthermore, it appears that the DNA testing which the United States wishes

to conduct provides a fairly simple and practical resolution of the issue. Given the importance of the issue of paternity in this case, the motion for physical examination will be granted. Plaintiffs' motion for protective order and sanctions will be denied.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that the motion to refile previous motions for summary judgment filed by defendants King and Board of Police Commissioners is **GRANTED.**

IT IS FURTHER ORDERED that the Attorney General's petition to substitute the United States of America for defendants Vecera, Bridges, and Burnett is **GRANTED.** The United States of America is substituted for defendants Vecera, Bridges, and Burnett in plaintiffs' FTCA claims in Count II of the fifth amended complaint.

IT IS FURTHER ORDERED that the United States' motion for enlargement of time is **GRANTED.** The United States will have twenty days from the date of this order to respond to plaintiffs' fifth amended complaint.

IT IS FURTHER ORDERED that the United States' motion for physical examination is **GRANTED** and shall be administered as indicated in said motion within thirty days of this order.

IT IS FURTHER ORDERED that plaintiffs' motion for protective order and sanctions is **DENIED.**

An appropriate order will accompany this memorandum and order.

Dated this 14th day of October, 1992.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS,	)	
Plaintiff,	)	
v.	)	No.88-1270 C(2)
ROBERT J. BAER, JOHN J. FRANK JAMES E. MOSBACHER, WILLIAM H. YOUNG, MAYOR VINCENT SCHOEMEHL, LAWRENCE J. KING, DAVID VECERA, EDWARD EDWARD BRIDGES, DENNIS BURNETT, and UNITED STATES OF AMERICA,	)	
Defendants.	)	

ORDER

In accordance with the memorandum and order filed this date and incorporated herein,

IT IS HEREBY ORDERED that plaintiffs' claims in Count II of their fifth amended complaint br .ght pursuant to the Federal Tort Claims Act against David Vecera, Edward Bridges, and Dennis Burnett are **DISMISSED** without prejudice.

Dated this 14th day of October, 1992.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT JUDGE

UNTIED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS, ALBERT DEUSER, and PHYLLIS MENKE,	)	
Plaintiffs,	)	
v.	)	No. 88-1270 C (2)
ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER WILLIAM E. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, and CHIEF RANGER DENNIS BURNETT,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motions for summary judgment filed by defendant King and the defendants that comprise the Board of Police Commissioners

("Board"), their motion to dismiss, and plaintiffs' motion for reconsideration and revision.

The facts of this case are set out in this Court's order of August 24, 1990, and need not be repeated in detail; however, they will be briefly reviewed. On July 4, 1986, Vecera and Bridges took Larry P. Deuser into custody at the Veiled Prophet Fair ("VP Fair") in St. Louis for urinating in public. The Rangers took Deuser to a field tent located on the fairgrounds. At the field tent, Chief Ranger Burnett was informed about the incident that led up to Deuser's detention. After discussion with St. Louis Police Officer Lawrence King, the decision was made to take Deuser away from the fairgrounds and then release him. King, Vecera, and Bridges put Deuser in a St. Louis Police van and took him to the rear of the federal building on Thirteenth Street at Spruce where he was released. Thereafter, Deuser was struck and killed on a highway in St. Louis.

In the August 24, 1990, order the Court granted a summary judgment motion brought by Vecera, Bridges, and Burnett ("Rangers") and dismissed plaintiffs'

substantive due process claim against them because, viewing the facts in the light most favorable to plaintiffs, the Court concluded that the Rangers actions at most amounted to mere negligence. The Court also found the Rangers were entitled to qualified immunity because their actions were objectively reasonable. After the Court reached that decision, the Eighth Circuit Court of Appeals decided the case of **Gregory v. Rogers**, 921 F.2d 750 (8th Cir. 1990). Plaintiffs requested this Court reconsider the decision dismissing their **Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics**, 403 U.S. 388 (1971) action in light of the Court of Appeals' decision. Subsequently, the Court of Appeals granted appellees' motion for rehearing. This Court stayed ruling of the motion to reconsider and the motions for summary judgment pending a decision by the Court of Appeals sitting en banc. The Court of Appeals has now affirmed the district court's order granting the defendants' motion for summary judgment. **Gregory v. Rogers**, 974 F.2d 1006 (8th Cir. 1992) (en banc), pet. For cert. Filed, 61 U.S.L.W. 3455 (U.S. Dec. 8, 1992) (No. 92-990).

The facts of **Gregory** are as follows: In the early morning of March 30, 1986, police officer Ronnie Howell stopped a car driven by Stanley Turner for running a red light. Turner, who was the "designated driver," was driving home two friends who were intoxicated. A warrant check of Turner revealed an outstanding warrant for his arrest. Although there was no evidence Officer Howell initiated an investigation of the identity or condition of the passengers in the car, there was evidence he knew they had been drinking. Officer Howell took Turner into custody, instructing him to drive the car and follow him to the police station to clear up the matter of the warrant. Turner followed those instructions and upon arriving at the police station was detained. The passengers were left in the car. One of the passengers started the car, and the two drove away. Shortly thereafter, the car was involved in an accident. One of the passengers died and the other sustained extensive injuries. Both were legally intoxicated at the time of the accident. In affirming the district court, the

Court of Appeals held that Howell had not deprived the passengers of a protected right.

In Gregory, the court found that the officer had not taken the passengers into custody or exercised control over them; did not know and did not have reason to know the passengers were intoxicated; and did not affirmatively place the passengers in a position of danger simply by leaving them in the car alone. This case is distinguishable on all three of these key points. The Rangers and King exercised control over Larry Deuser when they removed him from the fairgrounds; there is sufficient evidence to create a question of fact whether Deuser was intoxicated at the time and whether these defendants knew or reasonably should have known that fact; and defendants took affirmative action by removing Deuser to a location away from the fair.

In its August 24, 1990, order this Court found that Deuser was not deprived of a protected right because the Rangers' actions were at most negligent. After reviewing the record in light of Gregory, the Court will vacate that finding. Similarly, the Court will vacate the finding that the

Rangers' actions were objectively reasonable, thus entitling them to qualified immunity. This action is taken as the Court now finds there is a question of fact on this issue which precludes resolution by summary judgment. The Rangers also sought summary judgment on the basis that their actions did not cause Larry Deuser's death. Although the Court did not address that argument in the August 24 order, it now finds summary judgment is not warranted on that basis. For all these reasons, plaintiffs' motion for reconsideration and revision will be granted. The order granting the Rangers' motion for summary judgment will be vacated and the motion will be denied.

In accordance with this Court's order of October 14, 1992, the separate motions for summary judgment of King and the Board of Police Commissions will be taken as directed to Count I of the fifth amended complaint.

The cause of action against defendant King and the Board is based on 42 U.S.C. § 1983 and the Missouri Wrongful Death Statute, Mo.Rev.Stat. § 537.080 (1986).

King's motion for summary judgment is based on this Court's ruling of August 24, 1990. Relying on that ruling, King claims that he is entitled to summary judgment on plaintiffs' § 1983 claim because he did not deprive Deuser of a right guaranteed by the Fourteenth Amendment and because he is entitled to qualified immunity. Since the Court will grant plaintiffs' motion for reconsideration and will vacate the order granting the Rangers' motion for summary judgment, King's motion will be denied on these points.

King also suggests he is immune from suit on plaintiffs' state law claim because he was performing a discretionary act when he decided not to arrest Deuser. In Missouri,

> [i]t is well established that public officers acting within the scope of their authority are not liable for injuries arising from their discretionary acts or omissions, but they may be held liable for torts committed when acting in a ministerial capacity . . . . Whether an act can be characterized as discretionary depends upon the degree of reason and judgment required. It has been said that a discretionary act requires "the exercise of reason in the adaption of means to an end and discretion in determining how or whether an act should be done or course pursued." . . . A ministerial function, in contrast, is one "of a

> clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed."

Kanagawa v. State, 685 S.W.2d 831, 835-36 (Mo, 1985) (en banc). The determination of whether an act is discretionary or ministerial is fact specific. The courts weigh such factors as the nature of the officials' duties, the extent to which the acts involve policymaking or the exercise of professional judgment, and the likely consequences of withholding immunity. **Id**. At 836.

Plaintiffs maintain that under Section VII of Special Order NO. 81-S-1 of the Metropolitan Police Department, City of St. Louis, once King received an assignment for the transfer of Deuser, who was intoxicated, he had either to take Deuser to the district station, to a Detoxification Center, or to a hospital (and then to the Prison Processing Center for safekeeping). The Court has reviewed order NO. 81-S-1 and agrees with plaintiffs that if Deuser was intoxicated, which the Court will assume for the

purposes of this motion, King's decision as to what to do with Deuser might have been "ministerial." Therefore, King is not entitled to summary judgment on the grounds of official immunity.

Plaintiffs have also brought suit against the individuals comprising the Board in their official capacities. Plaintiffs assert that the Board permitted, encouraged, tolerated, and ratified the practice of its police officers to arrest people and then remove them from the V.P. Fair and thereafter release them on the streets and highways of St. Louis to fend for themselves. The Board contends, correctly, that it cannot be liable under § 1983 if King did not commit a constitutional tort. See **Gregory**, 974 F.2d at 1012. However, since King's motion for summary judgment will be denied on this point, the Board's motion likewise will be denied on plaintiffs' § 1983 claim.

As to plaintiffs' wrongful death claim, the State of Missouri has not waived its sovereign immunity. In **Jones v. State Highway Com.**, 557 S.W.2d 225 (Mo. 1977) (en banc), the court abrogated the common law doctrine of

sovereign immunity. In response, the Missouri legislature passed, inter alia, Mo.Rev.Stat. § 537.600 which re-established with exceptions the doctrine of sovereign immunity. Section 537.600 states:

> 1. Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to this date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby waived in the following instances:
>
> > (1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles. . . .
> >
> > (2) Injuries caused by the conditions of a public entity's property [if that property was in a dangerous condition] . . . .

The Board was created by the Missouri legislature and it governs the St. Louis police force. As such, it is a public entity for purposes of § 537.600. **Best v. Schoemehl**, 652 S.W.2d 740, 743 (Mo.App. 1983). "The liability of a public entity for torts is the exception to the general rule of immunity for torts and it is incumbent upon a

plaintiff who seeks to state a claim for relief to specifically allege facts establishing that an exception applies." Id. At 743. Plaintiffs have not alleged facts establishing an exception applies and, therefore, the Court will grant the Board's motion for summary judgment.

The Board and King also move to dismiss on the ground that Tine Marie Sellers does not have standing to sue under 42 U.S.C. § 1983. The motion is directed to the third amended complaint. Unlike their motions for summary judgment, the Board and King did not refile this motion after the filing of the fifth amended complaint. Because the motion is directed to the third amended complaint and defendants did not refile it, the Court will deny the motion without prejudice as moot.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that plaintiffs' motion for reconsideration and revision is **GRANTED.** That portion of the August 24, 1990, order granting the Rangers' motion for summary judgment and the judgment in the

Rangers' favor are **VACATED**. The Rangers' motion is **DENIED.**

IT IS FURTHER ORDERED that defendant King's motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that the motion for summary judgment of the defendants comprising the Board of Police Commissioners is **GRANTED** with respect to plaintiffs' state law claim and is **DENIED** in all other respects.

IT IS FURTHER ORDERED that the motion to dismiss filed by the Board and King is **DENIED** without prejudice as moot.

An appropriate judgment shall accompany this memorandum and order.

Dated this 14th day of April, 1993.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT JUDGE

UNTIED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS, ALBERT DEUSER, and PHYLLIS MENKE,	)	
Plaintiffs,	)	
v.	)	No. 88-1270 C (2)
ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER WILLIAM E. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT,	)	
Defendants.	)	

JUDGMENT

In accordance with the memorandum and order filed this date and incorporated herein,

IT IS HEREBY ORDERED AND ADJUDGED that the defendants comprising the Board of Police

Commissioners shall have judgment against plaintiffs on plaintiffs' claims under the Missouri Wrongful Death statute and that claim is **DISMISSED** with prejudice.

Dated this 14th day of April, 1993.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT JUDGE

UNTIED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS, ALBERT DEUSER, and PHYLLIS MENKE,	)	
Plaintiffs,	)	
v.	)	No. 88-1270 C (2)
ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER WILLIAM E. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and UNITED STATE OF AMERICA,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motion for reconsideration filed by defendants Vecera, Bridges, and Burnett and their request for a stay.

Defendants' motion requests that the Court reconsider its order of April 14, 1993. The Court has considered defendants' arguments and will deny the motion.

Defendants have filed a notice of appeal from the portion of the A order denying their motion for summary judgment based on qualified immunity. Defendants' request that this case be stayed pending the appeal will be granted.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that the motion for reconsideration filed by defendants Vecera, Bridges, and Burnett is **DENIED.**

IT IS FURTHER ORDERED that the request for a stay by defendants Vecera, Bridges, and Burnett is **GRANTED.** All proceedings in this case are **STAYED** pending a decision by the United States Court of Appeals for the Eighth Circuit on the appeal filed by these defendants.

Dated this 14th day of May, 1993.

EDWARD L. FILIPPINE /S/
UNITED STATES DISTRICT JUDGE

METROPOLITAN POLICE DEPARTMENT-CITY OF ST. LOUIS
OFFICE OF THE CHIEF OF POLICE
SPECIAL ORDER

Section VII of
Date Issued February 6, 1981 Order No. 81-S-1

Effective Date February 11, 1981 Expiration Indefinite

Reference

Cancelled Publications 78-S-1

HANDLING OF INTOXICATED PERSONS

Subject (DETOXIFICATION CENTER AND SAFEKEEPING PROCEDURE)

TO: ALL BUREAUS, DISTRICTS AND DIVISIONS

A. INTRODUCTION

1. The Revised Statutes of the State of Missouri provide that no county or municipality may adopt or enforce a law, rule or ordinance which authorizes or requires arrest or punishment for public intoxication or being a common or habitual drunkard or alcoholic. Therefore, when an officer observes or receives an assignment for an intoxicated person he will:

a. take the subject to the district station so that he can call a relative or friend to come for him, call a taxi for the subject, or

b. Take the subject to the Detoxification Center, or

c. If there is no room at the Detoxification Center take the subject to the hospital and then to the Prisoner Processing Division for safekeeping where he can recover sufficiently. The subject will be kept at Prisoner Processing no longer than twelve (12) hours.

(2)

No. 94-1028

Supreme Court, U.S.
FILED
DEC 13 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS, ALBERT DEUSER, and PHYLLIS MENKE,

Petitioners,

v.

ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER, WILLIAM E. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and the UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER, WILLIAM E. YOUNG, AND VINCENT C. SCHOEMEHL AS MEMBERS OF THE BOARD OF POLICE COMMISSIONERS FOR THE CITY OF ST. LOUIS AND LAWRENCE J. KING

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS, ALBERT DEUSER, and PHYLLIS MENKE,

Petitioners,

v.

ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER, WILLIAM E. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and the UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER, WILLIAM E. YOUNG, AND VINCENT C. SCHOEMEHL AS MEMBERS OF THE BOARD OF POLICE COMMISSIONERS FOR THE CITY OF ST. LOUIS AND LAWRENCE J. KING

Respondents Robert J. Baer, John J. Frank, James E. Mosbacher, William E. Young, as Members of the Board of Police Commissioners for the City of St. Louis, and Vincent C.

Schoemehl, in his ex officio capacity, and Lawrence J. King respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 28 F.3d 895 (8th Cir. 1994).

STATEMENT OF THE CASE

Respondents herein incorporate by reference the statement of facts in the opinion below (Pet. App. p. 4-6) which is fair and evenhanded.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE HOLDING OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the Eighth Circuit is based upon two holdings. First, that no constitutional violation existed. Secondly, and primarily, that the Respondents were entitled to qualified immunity.

a. *Substantive Due Process*

With respect to the existence of any constitutional violation, the Eighth Circuit applied the principles of *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). This Court in *DeShaney* established in 1989 the contours of the constitutional right of a person released from custody by the State. There is no duty to protect against private violence except in limited circumstances

Following *DeShaney,* the Eighth Circuit has found that constitutional rights may be implicated where a person is placed in greater danger than he was when taken into custody. *Sellers* opinion App. 7, 10, citing *Gregory v. City of Rogers,* 974 F.2d 1006 (8th Cir. 1992) (en banc), *cert denied,* __U.S.__, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993).

For purposes of this writ, what is significant is that *Sellers* applies not only the holding in *DeShaney* but also recognizes those pre-*DeShaney* decisions from other circuits that held that deprivations of substantive due process based on police officers' decisions to leave vulnerable individuals in clearly dangerous circumstances. See App. 16 citing *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989) *cert. denied,* 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *White v. Rockford,* 592 F.2d 381 (7th Cir. 1979). The decisions are cited and relied upon by the Petitioners.

In the application of *DeShaney* based upon the record before it, which contained extensive discovery, the court here did not conclude that a constitutional violation existed. This was based on the fact that the decedent, an adult male, was released "near a police station at approximately 9:00 p.m. on a midsummer evening, where he could have called for a ride." App. p. 13. The view of the record was that a reasonable fact-finder could not conclude that the officers intentionally, wilfully, or recklessly placed decedent in a position of greater harm than when they removed him from a fairground. App. p. 21.

b. *Qualified Immunity*

The primary basis for the *Sellers* decision is the Respondents' entitlement to qualified immunity. This was based on two grounds. First, in this fact-intensive record, it was concluded that the conduct of the law enforcement officers met the test of "objective reasonableness." In viewing the Respondents' conduct, it was held that reasonable officers would not have known that decedent's constitutional rights were being violated by removing him from a fairground of 600,000 people because of his obnoxious conduct and releasing him near a police station approximately 10 blocks away in an intoxicated state and without funds. This was rather than retain custody and charge him with disorderly conduct. App. p. 12.

In addition, the principles regarding constitutional rights in custodial situations were not "clearly established" in 1986 in the Eighth Circuit at the time of the incident. As *Sellers* points out in footnote 6, it was only in *Wells v. Walker,* 952 F.2d 368 (8th Cir. 1988) *cert. denied* 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989) that for the first time a possible due process violation for releasing from custody was recognized. App. p. 14. The actions of the officers must be judged at the time they occurred as to the existence of constitutional rights. *Anderson v. Creighton,* 483 U.S. 635, 636-37, 107 S.Ct. 3034, 3036, 97

L.Ed.2d 523 (1987). The Petitioners' reliance upon the earlier Seventh Circuit decision of *White v. Rockford,* 592 F.2d 381 (7th Cir. 1979) as establishing the constitutional right in the Eighth Circuit is misplaced. The inquiry as to whether a constitutional right is clearly established extends first to decisions of the Supreme Court, then to decisions of the circuit, and only then to decisions of others circuits. *Daugherty v. Campbell,* 935 F.2d 780, 784 (6th Cir. 1991).

Petitioners' reliance upon *Wood v. Ostrander,* 851 F.2d 1212 (9th Cir. 1988) is likewise misplaced. Pet. 20. First, it is misplaced because although petitioners do not tell the Court that the opinion was modified on rehearing, it was, *Wood v. Ostrander, supra,* 879 F.2d 583 (9th Cir. 1989). Second the Ninth Circuit finding that the law in 1984 in that circuit regarding the stranding of a person as a violation of due process was clearly established does not establish it as so in the Eighth Circuit. Significantly, *Wood* was not decided until two years after the occurrence in *Sellers.*

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS THAT PROVIDES A BASIS FOR GRANTING THE WRIT.

The petition appears to be based upon an alleged conflict within the Eighth Circuit. This is based upon petitioners' reading of *Gregory.* Petition p. 27.

As *Sellers* indicates, *Gregory* did not deal with the question of qualified immunity. If such a conflict exists, this should be resolved by that court en banc. Regardless, a conflict within a circuit does not provide a basis for granting a writ of certiorari by this Court.

The two decisions cited from the Seventh and Ninth Circuits likewise did not deal with qualified immunity. Also, they were both pre-*DeShaney.* If a conflict were to exist, it would only be

after decisions have been rendered interpreting *DeShaney.* The Eighth Circuit in *Sellers,* as previously stated, applied the principles in that decision. No decision from another circuit has been cited by petitioner where a conflicting interpretation has been rendered.

The real complaint of petitions is to the underlying factual basis for the granting of the summary judgment. Petitioners inappropriately request this Court to consider the record and evidence before the Eighth Circuit. Petitioner "prays that this honorable court consider the evidence to which the Eighth Circuit held a blind eye so that justice may prevail . . . the location of release is an extremely important aspect of this case in determining the level of culpability of the officers. The record clearly supports reasonable differences of opinion. . ." Petition p. 31. It is also stated therein that "failure of the Eighth Circuit to consider the factual matters properly before it runs afoul of this Court mandate in *Celotex Corporation v. Catrett*" (cite omitted) Petition p. 31.

Respondents strongly suggest that such an argument necessitates denial of the writ. Petitioners seek to have this Court reexamine the facts in the record. This Honorable Court ought not to provide super appellate review. This was a fact intensive case where the Eighth Circuit applied the standard of "objective reasonableness" to conclude that respondents had official immunity. The function of reviewing the record in this cause is not the kind that this Court's resources ought to be expended upon.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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